North Dakota Law Review

Volume 67 | Number 2 Article 1

1991

The Courts and Athletic Scholarships

Robert N. Davis

THE COURTS AND ATHLETIC SCHOLARSHIPS

ROBERT N. DAVIS*

I. INTRODUCTION

This article was completed on the heels of the 85th annual convention of the National Collegiate Athletic Association (NCAA) that met in Nashville, Tennessee from January 7-11, 1991. The 85th annual convention will be viewed by history as the first major step of intercollegiate athletic reform in the 1990s. Dubbed the "Reform Convention," this convention set NCAA delegate attendance records and included the passage of major cost-cutting reform measures.[1] However, despite the success of this convention, in my view it is only the beginning of what I hope will be continued efforts to re-adjust the focus of our institutions of higher learning. While it is a beginning, there remain many very serious problems that need attending to in intercollegiate athletics. One of those problems involves athletic scholarships and institutional expectations of its student-athletes.[2]

This article explores how the courts have viewed arrangements between universities and student-athletes. Part I is the introduction, and raises questions regarding the student-athlete and the university. Part II surveys early judicial approaches to analyzing scholarships, and Part III surveys the modern cases involving athletic scholarships. Part IV discusses the implications of determining scholarship students to be employees, and my conclusion in Part V is that neither early nor modern judicial approaches to resolving issues involving athletic scholarships provide any consistent doctrinal guidance. In some cases, the courts have approached the athlete/institutional arrangement with a contractual analysis without blinking an eye. In other cases, the courts have stretched logical decision-making in order to conclude that a contract did not exist. This judicial confusion is the result of institutional and NCAA hypocrisy regarding the mission of athletic

* Robert N. Davis is an Associate Professor of Law at the University of Mississippi. Mr. Davis graduated from the University of Hartford in 1975 with a Bachelor of Arts degree in Political Science and received his Juris Doctorate in 1978 from Georgetown University Law Center. He teaches sports law, constitutional law, administrative law, and labor relations.

1. *Presidents Let It Be Known That They're in Charge*, NCAA NEWS, Jan. 16, 1991, at 1, col. 1.

2. I use the term "athlete-student" because I think it appropriately describes the present dilemma faced by many Division I universities regarding their athletic programs. For many universities, the "student-athlete" no longer exists, because the academic mission has been supplanted by the athletic mission.

programs. I believe the sooner we accept athletics as entertainment and treat athletes as employees, the sooner current problems in intercollegiate athletics will be remedied. On the other hand, if we are unwilling to treat athletes as employees, we should allow true students to play the games and put an end to recruiting professionals to play college sports.

Colleges and universities have been reluctant to acknowledge that the relationship between schools and student-athletes is one of business. They have also been reluctant to recognize athletic scholarships as contracts and athletes as employees. Thus, institutions have been able to benefit from the athletic talents of student-athletes, very often at the expense of the student athlete. If the student-athlete does not leave school with a diploma, the underlying time demands in the sport are frequently overlooked as a cause for not completing academic requirements.

Is there a "bargained for exchange" between the institution and its athletes?[3] Indeed, the answer may have very significant consequences for the athlete and the institution in terms of the athlete's status as an amateur, as an employee of the institution, or as one who receives taxable income in the form of a scholarship.[4]

Universities are involved in a business relationship with the student body in general and student-athletes in particular. But they have been reluctant to acknowledge the nature of the true relationship and have been operating under the facade of providing athletes an education. The graduation rates of Division I athletes tell a different story. One third of the nation's biggest sports schools graduate less than twenty percent of their basketball players, and half graduate less than forty percent of their football players.[5] Moreover, the institutions are benefitting financially from a relationship that, under any other circumstances, would be called exploitative.

The courts have had a difficult time squaring the characterizations of the institutions with the application of the legal rules. The

3. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981). For a detailed analysis of the scholarship as a contract in the context of a common law action for tortious interference with a contractual or business relationship, see, Woods and Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy For The Unscrupulous Sports Agent*, 40 ALA. L. REV. 141, 150-51 (1988).

4. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS, § 1.06 to 1.08, 9-19 (1979) (Professor Weistart discussed the institutional implications for treating athletes as employees).

5. Chron. Higher Ed., Sept. 20, 1989, at A43, col.1.

fact that some courts have viewed scholarships as contracts supports the business relationship theory.

This article suggests that universities should view athletes as employees, because the scholarship is an employment contract. It may be necessary to compensate these athletes beyond the value of the scholarship, and for those students who are genuinely interested in pursuing a college degree, part of the compensation package should include tuition, room and board, and other fees. Additionally, students seeking degrees should be allowed to pursue their academic interests by taking a reduced course load during the competitive sport season. Those students who have no interest in education should be paid as entertainers and not required to take on the additional burden of attending classes in which they have little or no interest. These suggestions would make our universities more intellectually honest and remove the temptations to violate institutional and NCAA rules that are, at best, impossible to comply with in the present intercollegiate sports environment.

II. THE EARLY DECISIONS

The elements of a contract are straightforward. The formation of a contract requires: (1) an offer, which is the "manifestation of willingness to enter into a bargain . . .";[6] (2) acceptance, which is the "manifestation of assent" to the terms of the offer through either performance or a mutual promise;[7] and (3) consideration, which is a bargained-for promise or return promise.[8]

The language of the scholarship documents themselves provides the most persuasive indicia that these "arrangements" constitute something more than an academic gift.[9] The financial aid agreement is the offer from the institution to pay for the student-athlete's tuition and fees, and room and board. The value of the

---

6. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).
7. *Id.* at § 50.
8. *Id.* at § 71.
9. The Southeastern Conference Application For Scholarship, Form ASM-88, for the applicant provides:

I wish to attend ____ University provided you can award me some form of scholarship.

* * *

(5) If I become the beneficiary of this scholarship and participate in the above listed sport, I understand I will never be eligible for this sport at any other Southeastern Conference Institution, unless my athletic grant is not renewed by the awarding institution.

* * *

If scholarship is granted, the beneficiary pledges to participate in the sport listed on application to the best of his ability.

Form ASM-88, Southeastern Conf. Application for Scholarship.

scholarship is the consideration. The student-athlete accepts the offer and, in return, promises to give the institution his or her athletic ability for a period of time on a yearly basis, not to exceed four years of eligibility. The student-athlete also promises to comply with institutional, conference and NCAA rules.[10] The National Letter of Intent likewise meets the requirements of offer, acceptance and consideration.[11] While the courts have held the arrangement to be a contract in some cases, the decisions also reflect some confusion regarding the status of the institution/athlete relationship.[12] The courts are not in agreement regarding characterization of the athlete/institution relationship, but the trend seems to be toward a recognition that a scholarship is a contract.

Because of the implications of characterizing the athlete/institution relationship as contractual, the early decisions have sought to distinguish some relationships from the normal type of scholarship arrangements. The athlete/institution relationship could become very complicated if institutions recognized students as employees. Questions of tax liability, worker's compensation, and overall amateur status would be raised.[13]

The early judicial decisions demonstrate that the courts were not quite sure what to make of the scholarship arrangement

---

10. *Id.*

11. *See generally* Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989) (an excellent and comprehensive analysis of the National Letter of Intent). The Men's National Letter of Intent provides: "By signing this Letter, I understand that if I enroll in another institution participating in the National Letter of Intent Program . . . I may not represent that institution in intercollegiate athletic competition until I have been in residence at that institution for two calendar years and in no case will I be eligible for more than two seasons of intercollegiate competition in any sport . . . ." *Id.* at 1377. It also provides that: "I understand that all participating conferences and institutions (listed below) are obligated to respect my [decision] and shall cease to recruit me" once I have signed this letter. *Id.*

12. *See* University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953) (holding that the student-athlete was an employee and entitled to worker's compensation benefits in Colorado); Van Horn v. Industrial Accident Comm'n, 319 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963) (a California court annulled the Industrial Board's decision and found that the student-athlete's widow was entitled to death benefits arising out of student-athlete status as an employee); Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (1972) (North Carolina court held that a scholarship was a contract, and the university complied with its terms but the student-athlete did not); Gulf South Conf. v. Boyd, 369 So. 2d 553 (Ala. 1979) (court held right to participate in college athletics was a property right); Barile v. University of Virginia, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981) (breach of contract action dismissed for lack of personal jurisdiction); and Waters v. University of South Carolina, 280 S.C. 572, 313 S.E.2d 346 (1984) (directed verdict in favor of university labeled scholarship as a grant-in-aid contract). *But see*, State Compensation Ins. Fund v. Industrial Comm'n., 135 Colo. 570, 314 P.2d 288 (1957) (Colorado Supreme Court held athlete not an employee and no contract existed); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (Indiana Supreme Court held no employer-employee relationship existed between athlete and university); and Coleman v. Western Mich. Univ., 125 Mich. App. 35, 336 N.W.2d 224 (1983) (Michigan Court of Appeals held scholarship student-athlete not an employee within the meaning of Michigan statute).

13. WEISTART & LOWELL, *supra* note 4, §§ 1.07 to 1.10 at 12-20.

between the student-athlete and university. Thus, in cases like *University of Denver v. Nemeth*,[14] the court focused on the fact that Nemeth was given an income-producing job, meals, and lodging in exchange for performance on the football field.[15] The court characterized the relationship as one in which Nemeth's employment "was dependent on [him] playing football."[16]

Nemeth arose in the context of a worker's compensation claim for a back injury sustained during football practice.[17] Nemeth claimed he was employed by the University of Denver, and the Colorado Industrial Commission agreed and awarded him compensation under the state Worker's Compensation Act.[18] The state district court affirmed the commission, and the University appealed, arguing that the Worker's Compensation Act was not intended to apply to students employed part-time by the university.[19] The Supreme Court of Colorado affirmed the lower court's finding that Nemeth was an employee and allowed the compensation award to stand.[20]

The Colorado Supreme Court, in affirming the lower court award of worker's compensation to Nemeth, held:

> Counsel for plaintiffs in error states that these opportunities (free meals and a job) 'were extended to Nemeth exclusively by reason of his being a student at the University,' and had no connection with his football activities.
>
> It appears from the record that Nemeth was informed by those having authority at the University, that 'it would be decided on the football field who receives the meals and the jobs.' He participated in football practice, and after a couple of weeks a list of names was read, which list included Nemeth's name, and he was then given free meals and a job. One witness said: 'If you worked hard (in football) you got a meal ticket.' Another

14. 127 Colo. 385, 257 P.2d 423 (1953).
15. University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).
16. *Id.* at __, 257 P.2d at 427. *See also*, WEISTART & LOWELL, *supra* note 4, at § 1.07, n.47 (for a comparison of the employment arrangement with that of work-study arrangements).
17. *Nemeth*, 127 Colo. at 385, 257 P.2d at 424.
18. *Id.* at 387, 257 P.2d at 425.
19. *Id.* at 390, 257 P.2d at 426.
20. *Id.* at 391, 257 P.2d at 430. Nemeth was in the business school at the university, and was paid a stipend of $50 per month for cleaning the tennis courts. *Id.* at __, 257 P.2d at 424. From his stipend, he paid "$10 per month for three meals [a] day" and received free housing on campus in exchange for cleaning the furnace and sidewalks at the residence hall. *Id.* Nemeth contended that the only reason he was employed by the university was to play football. *Id.* at 387, 257 P.2d at 425. The university argued that he was "employed not to play football, but to keep the tennis courts free from gravel and litter." *Id.*

> testified that, 'the man who produced in football would get the meals and a job.' The football coach testified that the meals and the job ceased when the student was 'cut from the football squad.'[21]

Thus, the Colorado Supreme Court considered state precedent, which included cases involving employee injuries in company-sponsored athletic contests, and said that the controlling point is whether the injury arose as a result of some activity that was incident to employment.[22] The court concluded that Nemeth's employment at the university was dependent on his football skills, and if he stopped playing football he would lose his job.[23] The court declared Nemeth to be an employee of the university and entitled to worker compensation benefits.[24] The court also noted that "[Higher] education in this day is a business, and a big one."[25]

Significantly, Justice Knauss, writing for the majority, analyzed the student-athlete and institutional relationship as one of employer-employee. In *Nemeth*, the court characterized the student-athlete as an employee, based on the terms of the arrangement.[26]

The *Nemeth* decision was one of the first opportunities the courts have had to characterize the institution/athlete relationship. While *Nemeth* was decided in 1953, the circumstances in that case are not significantly different from the scholarship arrangements today. Rather than providing the student-athlete with a part-time job today, the university provides the student with a full stipend, including room, board and tuition expenses. If a student-athlete does not make the team or elects to withdraw from the sport, he or she may not receive a scholarship, which frequently includes work-study arrangements. Nevertheless, univer-

---

21. *Nemeth*, 127 Colo. at 390, 257 P.2d at 426.
22. *Id.*
23. *Id.* at 392, 257 P.2d at 427.
24. *Id.* at 398, 257 P.2d at 430. The court said that:

> [t]he fact that students augment the funds necessary for their maintenance while attending the University, does not alter the fact that they may be in the category of employees, subject to and entitled to the benefits of the Workmen's Compensation law. This is true irrespective of the amount of their earnings in the discharge of the duties assigned to them. Where, as here, a stipulated monthly amount is paid for a particular service rendered by one who is also a student, it cannot be said that the University is merely 'assisting' the student to obtain an education, and that the student, if injured in the course of his employment, cannot have the benefits of the compensation law.

Id. at 389, 257 P.2d at 425.
25. *Nemeth*, 127 Colo. at 389, 257 P.2d at 425-26.
26. *Id.* at 389, 257 P.2d at 425.

sities continue to maintain that the athletes are not employees. The passage of thirty-seven years has not made higher education or college sports any less of a big business.[27]

An example of the lack of clear direction by the courts is *State Compensation Insurance Fund v. Industrial Commission,*[28] decided four years after *Nemeth,* in which the court determined that death benefits would not be paid to the widow of Ray Herbert Dennison, a scholarship student-athlete who had been killed during a football game.[29] In *State Compensation Insurance Fund*, the Supreme Court of Colorado stated:

> Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the Act. A review of the evidence disclosed that none of the benefits he received could, in any way, be claimed as consideration to play football, and there is nothing in the evidence that is indicative of the fact that the contract of hire by the college was dependent upon his playing football, that such employment would have been changed had deceased not engaged in the football activities.[30]

The facts in *State Compensation Insurance Fund* were no different from those of *Nemeth,* yet the court reached an opposite result.[31] The court distinguished *State Compensation Insurance Fund* from the *Nemeth* decision by saying that a contractual relationship existed in *Nemeth.*[32] The court said in *Nemeth* that employment was dependent on Nemeth playing football, and it was clear that if he did not perform as a football player, he would

---

27. Revenue payments for the 1990 bowl games reflect the magnitude of the business of sports. For example, each team participating in the major bowls—Rose, Orange, Sugar and Cotton— received 6, 4.2, 3.25 and 3 million dollars respectively. USA Today, Dec. 31, 1990, at 4E.

28. 135 Colo. 570, 314 P.2d 288 (1957).

29. State Compensation Ins. Fund v. Industrial Comm'n, 135 Colo. 570, 314 P.2d 288 (1957).

30. *Id.* at 572, 314 P.2d at 289-90.

31. Dennison was working a part-time job at a filling station, when he was approached by the football coach about the prospect of playing for Fort Lewis A & M college. *Id.* at 571, 314 P.2d at 289. At the hearing before the State Compensation Commission, the football coach testified that, " 'Ray wanted to play football and he had a job in town at a filling station that would require more time. I asked him if he could get a job that would make him as much as he made at the filling station at different hours, would he play football and he said "yes" '." *Id.* at 571, 314 P.2d at 290. Dennison was subsequently employed by the college to manage the student lounge and work on the college farm. *Id.* at 571, 314 P.2d at 289. He worked about twenty hours a week and was paid the student rate. *Id.* Dennison was not paid for playing football. *Id.*

32. *State Compensation Ins. Fund,* at 571, 314 P.2d at 290.

lose his job and meals.[33] In the later case, the court said the evidence did not show that Dennison was hired contingent upon his playing football.[34]

While the distinction may have been "apparent"[35] to the court, it is lost on me. If Dennison had responded to the coach's inquiry that he would take the job and go to school, but could not promise his participation on the football team, would Dennison have been employed? Had Dennison accepted the college job and then decided not to play football, would he have been allowed to keep the job? Would the coach have even offered Dennison a job, if it were not for his football talents? The Colorado Supreme Court glossed over these evidentiary gaps in the record, but jumped to the conclusion that Dennison was not under contract to play football and that *State Compensation Insurance Fund* was, therefore, a very different case from *Nemeth*.

The only real difference is in *Nemeth*; the university clearly conditioned employment on playing football based on witness statements, and in the case, *sub judice*, the university did not make its athletics interests as obvious. However, based on the exchange between Dennison and the football coach, it would seem that a precondition for Dennison's employment was his willingness to play football. Thus, I think the cases are indistinguishable. But the court went to great lengths in its attempt to distinguish the cases. After recognizing college sports as big business, the court, in *State Compensation Insurance Fund*, did an about-face and said: "It is significant that the college did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation."[36] This decision is troubling because of the factual similarities between *State Compensation Insurance Fund* and *Nemeth*. Perhaps the court thought it had opened a pandora's box in the *Nemeth* decision and was now retreating from that box because of the implications of that decision for institutions throughout the state. A more likely explanation, however, is the change in the make-up of the court. By 1957, when the *State Compensation Insurance Fund* case was decided, only two of the original seven justices who decided *Nemeth* in 1953 remained on the court. The

33. *Id.*
34. *Id.*
35. *Id.*
36. *State Compensation Ins. Fund*, 135 Colo. at 572, 314 P.2d at 290.

difference in result and emphasis in the opinion suggests a major philosophical shift had occurred.

In 1963, a California court addressed the question of the nature of the relationship between a student-athlete and institution by adopting a contractual analysis. In *Van Horn v. Industrial Accident Commission*,[37] the California District Court of Appeal annulled and remanded an order of the Industrial Accident Commission (Commission), which had denied death benefits to the widow and dependent children of Edward Van Horn, a member of the California State Polytechnic College football team.[38] The Commission determined that there was no contract of employment between the college and Van Horn.[39] But the court held that Van Horn was an employee, that a contract did exist between the athlete and California Polytechnic College, and that death benefits should be paid.[40] The court held: "The only inference to be drawn from the evidence is that decedent received the 'scholarship' because of his athletic prowess and participation. The form of remuneration is immaterial. A court will look through form to determine whether consideration has been paid for services."[41]

Mrs. Van Horn contended that her husband played college football under a contract of employment.[42] The college contended that Van Horn voluntarily played football and that the "scholarship" payments were gifts.[43] The court said that the record contradicted the Commission's findings that the scholarship

37. 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963).

38. Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, __, 33 Cal. Rptr. 169, 170 (1963).

39. *Id.* at __, 33 Cal. Rptr. at 172. The commission denied the application for benefits, based on a referee's determination that Van Horn was not an employee of Cal State, a contract did not exist, and playing football did not constitute rendering services under the Worker's Compensation Act. *Id.*

40. *Id.* at __, 33 Cal. Rptr. at 172-73. Edward Gary Van Horn, like Nemeth and Dennison, was offered an employment opportunity on campus in exchange for his agreement to play football for California State Polytechnic College. Id. at __, 33 Cal. Rptr. at 170. Van Horn was killed in a plane that crashed on its return to California from a football game in Ohio. *Id.* When Van Horn was recruited by the football coach, he was told that he would be given preference for a job on campus if he decided to enroll at Cal State. *Id.* Van Horn enrolled at Cal State in September 1956, and was given a job in the cafeteria. *Id.* But rather than playing football in the fall of 1957, Van Horn elected to work with his father at a flour mill in order to support his family. *Id.* Van Horn was offered more financial assistance from the coach if he would play football, and, in the Spring of 1958, he began practice with the team. *Id.* Van Horn would receive fifty dollars at the beginning of each quarter and an additional seventy-five dollars for rent. *Id.* at __, 33 Cal. Rptr. at 171. This money came from a special account maintained by the coach. The coach testified that part of the funds in the special account were donated by the Mustang Booster Club. *Id.* He also indicated that providing such payments to married students had been a long standing practice at the university. *Id.*

41. *Id.* at __, 33 Cal. Rptr. at 174.

42. *Van Horn*, 219 Cal. App. 2d at __, 33 Cal. Rptr. at 172.

43. *Id.*

was not dependent on playing football and was awarded on the basis of academic record, not athletic prowess.[44] The court concluded:

> The uncontradicted evidence was that to receive an athletic scholarship a student must have maintained a 2.2 grade average while carrying twelve units, must be a member of an athletic team, and be recommended by the coach to the scholarship committee. He recommended only those who were on the team. There was evidence that the coach had no power to overrule the committee or to terminate a scholarship before the term for which it was granted had elapsed but the evidence does not support the inference that there was no relationship between the "scholarship" and decedent's athletic prowess or participation.[45]

Thus, the court agreed with Mrs. Van Horn that her husband did play football under a contract with Cal State.[46] The court also noted that the public policy of the state was to liberally construe the worker's compensation law in order to carry out its beneficent purposes.[47] However, the court was careful to caution that every student under scholarship would not be deemed an employee. The court said:

> It cannot be said as a matter of law that every student who receives an "athletic scholarship" and plays on the school athletic team is an employee of the school. To so hold would be to thrust upon every student who so participates an employee status to which he has never consented and which would deprive him of the valuable right to sue for damages. Only where the evidence establishes a contract of employment is such inference reasonably to be drawn.[48]

The California Court recognized the problems attendant to a general rule that would include all scholarship students within the ambit of the worker's compensation statutes, and was careful to expressly state that this decision should be narrowly construed.

Ironically, in justifying the authority of the California Trustees

---

44. *Id.* at __, 33 Cal. Rptr. at 174.
45. *Id.*
46. *Van Horn*, 219 Cal. App. 2d at __, 33 Cal. Rptr. at 175.
47. *Id.* at __, 33 Cal. Rptr. at 174.
48. *Id.* at __, 33 Cal. Rptr. at 175.

of State Colleges to accept contributions from the Mustang Booster Club, the court noted that "[t]he trustees are authorized to accept any gift or donation of real or personal property whenever such gift . . . will aid in carrying out the primary function of the colleges."[49] The athletic program fell within the primary function of providing instruction at the undergraduate and graduate levels, because it was part of the curriculum, and participants received one-half unit of credit for each quarter.[50] Would the *Van Horn* Court be so willing to conclude that the athletic program falls within the primary function of the college today?

Based on the factual similarities in *Nemeth, State Compensation Insurance Fund*, and *Van Horn*, it is easy to conclude that the results should be the same. The common thread running through all three cases is the arrangement for a talented athlete to play a sport at college. In each case, the athlete was able to secure a job or receive benefits that otherwise may not have been available without an agreement to play ball. In each case, the athlete was injured or killed while engaged in football practice or a game sanctioned by the college. In each case, the university argued that the athlete was not an employee, merely because of the scholarship arrangement, and thus did not fall within the scope of the worker's compensation law.

In *Nemeth*, the court focused on the *quid pro quo* arrangement between the University of Denver and Nemeth, and decided that Nemeth's football prowess was responsible for the university giving him a job and meals.[51] In *State Compensation Insurance Fund*, the Supreme Court of Colorado distinguished *Nemeth* because, in its view, Nemeth's employment was dependent on his football performance.[52] In *State Compensation Insurance Fund*, the court said the same relationship between the university and the athlete did not exist, because the evidence did not expressly indicate that Dennison's employment was dependent on his football prowess.[53] While the same *quid pro quo* arrangement in *Nemeth* was extant in *State Compensation Insurance Fund*, the conditions for employment were not made as obvious by the

49. *Id.* at __, 33 Cal. Rptr. at 171-72.

50. *Van Horn*, 219 Cal. App. 2d at __, 33 Cal. Rptr. at 172.

51. University of Denver v. Nemeth, 127 Colo. 385, 390, 257 P.2d 423, 426 (1953). For an early discussion of the policy implications of defining the student/institution relationship as that of an employee/employer, see Steinbach, *Workmen's Compensation and the Scholarship Athlete*, 19 CLEV. ST. L. REV. 521 (1970).

52. State Compensation Ins. Fund v. Industrial Comm'n, 135 Colo. 570, 573, 314 P.2d 288, 290 (1957).

53. *Id.*

coach. However, in *State Compensation Insurance Fund*, the football coach asked Dennison if he would play football if he got a job on campus. It does not take much fact-finding to understand the practical implication of this arrangement. If Dennison had not agreed to play football, he probably would not have been offered the job. Thus, in my view, *Nemeth* and *State Compensation Insurance Fund* are more alike than the Supreme Court of Colorado thought.

The last case in the worker's compensation trilogy is *Van Horn*. In a factual setting very similar to *Nemeth* and *State Compensation Insurance Fund*, the California District Court of Appeal annulled and remanded the finding of the Industrial Accident Commission that Van Horn was not rendering services within the meaning of the worker's compensation law and thus not an employee of the university.[54] In *Van Horn*, the California District Court of Appeal concluded that "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded . . . is presumed to be an employee."[55] But the court hastened to add that it was not necessary that the compensation paid to the athlete be in the form of direct wages.[56] Thus, the scholarship arrangement in *Van Horn* was enough to bring him within the scope of the worker's compensation statute.

These cases establish the general rule that if evidence exists that the student-athlete agrees to play ball for certain financial or employment benefits, then, for worker compensation purposes, the athlete may be an employee. The universities do not want their student-athletes characterized as employees, because that characterization may require the expenditure of significant resources for worker's compensation insurance, and it may threaten the "amateur" status of the student-athlete.[57]

Thus, these cases represent early examples of the courts' struggle with the universities' position that scholarship athletes were not employees for hire. As a result, the courts and accident commissions attempted to draw fine factual distinctions in order to justify particular results. Frequently, as these cases demonstrate, the distinctions were more imagined than real.

---

54. Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, __, 33 Cal. Rptr. 169, 175.

55. *Id.* at __, 33 Cal. Rptr. at 172.

56. *Id.*

57. WEISTART & LOWELL, *supra* note 4, §§ 1.07, 1.09 at 12, 19. *See also*, NCAA BYLAW art. 12 NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL 1991-92, at 67 (Hereinafter NCAA MANUAL) (section specifies that only amateur student-athletes are allowed to participate and they may not receive "pay").

III. MODERN CASES

The more recent cases reflect a similar struggle with the appropriate characterization of the athlete/institution relationship. The seminal case addressing the question of whether a scholarship is a contract is *Taylor v. Wake Forest University*.[58] In *Taylor*, the North Carolina Court of Appeals stripped the student-athlete/institution relationship to its bare essentials and characterized it as a contract.[59] What makes *Taylor* a unique and important case is that it does not arise in the context of a worker's compensation claim. It is a straight-forward damages suit against the university for terminating Taylor's scholarship.[60] The question was whether Taylor lived up to his part of the agreement, which was to maintain his academic and athletic eligibility.[61]

Taylor submitted a scholarship application to Wake Forest University.[62] The university accepted his application and required that he comply with all applicable rules.[63] Some of these rules provided that Taylor would maintain eligibility and attend practice sessions.[64] Taylor began school and played football in the fall of 1967, but maintained a low grade point average.[65] Taylor then decided not to play spring football in 1968 in order to improve his academic standing, and he so notified the coach.[66] Taylor improved his academic standing beyond the university's requirements, but elected not to return to the football program.[67]

After his sophomore year, Taylor was notified that his scholarship would be terminated.[68] Taylor continued his education but incurred $5500 in expenses during his last two years of college.[69] The trial court granted summary judgment for the university, and the Court of Appeals affirmed stating:

> Both Gregg Taylor and his father knew that the application was for 'Football Grant-In-Aid Or A Scholarship,' and that the scholarship was 'awarded for academic

58. 16 N.C. App. 117, 191 S.E.2d 379 (1972).
59. Taylor v. Wake Forest Univ., 16 N.C. App. 117, 121, 191 S.E.2d 379, 382 (1972), *cert. denied* 282 N.C. 307, 192 S.E.2d 197 (1972).
60. *Taylor*, 16 N.C. App. at 118, 191 S.E.2d at 380.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at __, 191 S.E.2d at 380-81.
65. *Taylor*, 16 N.C. App. at 120, 191 S.E.2d at 381. The school required a 1.35 GPA after the first year, a 1.65 after the second year and a 1.85 after the third year. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

> and athletic achievement.' It would be a strained construction of the contract that would enable the plaintiffs to determine the 'reasonable academic progress' of Gregg Taylor. Gregg Taylor, in consideration of the scholarship award, agreed to maintain his athletic eligibility and this meant both physically and scholastically. As long as his grade average equaled or exceeded the requirements of Wake Forest, he was maintaining his scholastic eligibility for athletics. Participation in and attendance at practice were required to maintain his physical eligibility. When he refused to do so in the absence of any injury or excuse other than to devote more time to studies, he was not complying with his contractual obligations.[70]

The court characterized the relationship as contractual, and did not consider the possibility that it could be something else—an educational grant with conditions.[71] Characterizing the relationship as an educational grant with conditions, rather than a contract, is a way of avoiding the troublesome impact on the universities that would result if they were to recognize the business relationship with student-athletes. Here, the court focused on the substance of the agreement between the student and institution and called a scholarship a contract.[72]

In *Cardamone v. University of Pittsburgh*,[73] the Pennsylvania Superior Court vacated a lower court decree that would have required the university to continue medical payments to a student gymnastics team member, Thomas Cardamone, who was "permanently paralyzed from the neck down," when he fell from gymnastic equipment at the university.[74] While the result in *Cardamone* was that the university was not required to continue medical pay-

---

70. *Taylor*, 16 N.C. App. at 121, 191 S.E.2d at 382.

71. *See*, WEISTART & LOWELL, *supra* note 4, § 1.06 at 9-12 (for a discussion of this case and an alternative mode of analysis that would characterize the scholarship as an educational grant with conditions and allow the court to reach the same conclusion—that Taylor failed to meet the conditions).

72. *See, e.g.*, Begley v. Corporation of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973). In *Begley*, the United States District Court for the Eastern District of Tennessee, similarly applied a contractual analysis to a scholarship. In finding that the school could not pay Begley $11,208 (value of a four-year education), the court said the school was excused from liability for its inability to perform its promise, because "Mr. Begley was unable to comply with the fourth condition subsequent of the contract," which required that he maintain a predicted minimum grade-point average of 1.6. *Id.* at 910. At the time of the scholarship offer Begley's GPA was a 1.45. (Begley's GPA was actually 2.9, however that was calculated on an eight-point system rather than a four-point system.) *Id.* at 909.

73. 253 Pa. Super. 65, 384 A.2d 1228 (1978).

74. Cardamone v. University of Pittsburgh, 253 Pa. Super. 65, 70, 384 A.2d 1228, 1231 (1978).

ments, the analysis centered on whether or not a contract existed under the circumstances.[75]

In *Cardamone*, the student-athlete was not given an athletic scholarship prior to the injury. The university, subsequent to Cardamone's injury, signed a " 'Letter Memorandum of Expression of Intention and Acknowledgement of Understanding.' "[76] The "Letter Memorandum" provided that the university would pay medical bills until it decided not to.[77] For three years after the injury, the university contributed approximately $100,000 toward Cardamone's medical expenses.[78] In the fall of 1975, the university indicated it would cease payments.[79]

Cardamone argued that a valid contract existed because the university agreed to pay his medical expenses in exchange for his past gymnastic services.[80] But the court held that "[s]ervices rendered by . . . a student athlete, prior to the execution of the agreement, furnish no basis for holding that there was a binding legal agreement since past consideration is insufficient."[81] The court also held that the conditions for promissory estoppel were not met, because the agreement did not induce Cardamone to waive any other legal rights he may have had, such as the right to sue the university for damages.[82]

Thus, while this case is not the classic scholarship case, the court nevertheless relied upon the contract analysis and determined that Cardamone's athletic services were "neither rendered nor bargained for in exchange for the [university's] promise to pay [Cardamone's] medical bills."[83] The court concluded that there was no consideration and, therefore, no contract. Had Cardamone been under a scholarship, or had the agreement been executed prior to the injury, the result may have been different.

More recently, in *Gulf South Conference v. Boyd*,[84] the Alabama Supreme Court characterized an athletic scholarship as a property right[85] and the student-athlete/institution relationship as

75. *Cardamone*, 253 Pa. Super. at 71, 384 A.2d at 1232.
76. *Id.* at 70, 384 A.2d at 1231.
77. *Id.*
78. *Id.* at 70, 384 A.2d at 1231 n. 3.
79. *Id.* at 70, 384 A.2d at 1231.
80. *Cardamone*, 253 Pa. Super. at 71, 384 A.2d at 1232.
81. *Id.*
82. *Id.* at 73, 384 A.2d at 1233.
83. *Id.*
84. 369 So. 2d 553 (Ala. 1979).
85. Gulf South Conf. v. Boyd, 369 So. 2d 553, 556 (Ala. 1979). For additional discussion regarding whether a student athlete's athletic eligibility is a property right, see Riegel and Hanley, *Judicial Review of NCAA Decisions: Does the College Athlete Have A Property Interest In Interscholastic Athletics*, 10 STETSON L. REV. 483 (1981). For a related view, see

"contractual in nature."[86] This decision involved an eligibility determination for a football player who had played for one season at Livingston University, a Gulf South Conference (GSC) member institution, and did not have his scholarship renewed thereafter.[87] The student-athlete, Julian R. Boyd, then enrolled at Enterprise State Junior College and did not play football.[88]

Prior to the 1978 football season, Boyd discussed the possibility of transferring to Troy State University, but was told he was ineligible because the GSC rules prohibited athletic participation by a student who transfers from one GSC school to another.[89] He then brought a declaratory judgment action against the GSC conference, requesting that he be declared eligible to play varsity football.[90] The Alabama Supreme Court declared him to be eligible and held that "The lower court was therefore correct in ruling that Boyd was eligible to play football at Troy State University for the 1978-79 football season, since the 1978 football season occurred at the end of two years after Boyd's refusal to accept the second grant-in-aid offered by Livingston University."[91] The GSC had an additional rule that allowed a student to play athletics at another GSC school when the former GSC member does not renew a scholarship.[92] The student becomes a free agent and may sign with any GSC school.[93] Here, Boyd refused a second year scholarship offered him by Livingston University and enrolled in a non-conference junior college for a year.[94] Subsequent to his year at the junior college, Boyd sought enrollment at Troy State Uni-

---

Keyes, *The NCAA, Amateurism, and the Student-Athlete's Constitutional Rights Upon Ineligibility*, 15 NEW ENG. 597 (1980); Springer, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 10 CONN. L. REV. 318 (1978).

86. *Boyd*, 369 So. 2d at 558.

87. *Id.* at 555. The reasons for Boyd's decision not to return to Livingston University are unclear. Initially, Boyd told Coach Crowe that he could not continue to play as a running back because of an asthmatic condition. *Id.* He subsequently informed the Coach that he wanted to live in Enterprise, Alabama and attend Enterprise State Junior College. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 554.

91. *Boyd*, 369 So. 2d at 558. The court based its eligibility determination on two provisions of the Gulf South Conference bylaws, article V, section 3(C) and article VIII, section 3. *Id.* at 557-58.

Article V provides that if a conference member school does not renew a scholarship, the athlete becomes a free agent and may sign with any other conference school. *Id.* at 557-58. Article VIII provides that a student-athlete who does not accept a scholarship at a conference school and does not participate in the scholarship sport becomes a free agent after two years and may be signed by any conference member. *Id.* at 558.

92. *Boyd* 369 So. 2d at 556.

93. *Id.*

94. *Id.* at 555.

versity, a GSC member school.[95]

While the case involves a question of the interpretation of conference rules regarding eligibility, the court addressed the contract issue in dicta stating:

> It should be noted that the relationship between a college athlete who accepts an athletic scholarship and the college which awards such an athletic scholarship is contractual in nature. The college athlete agrees to participate in a sport at the college and the college in return agrees to give assistance to the athlete. The athlete also agrees to be bound by the rules and regulations adopted by the college concerning the financial assistance.[96]

While this decision offers little definitive guidance on the appropriate description of the athlete/institution relationship, the court's dicta clearly suggests that the relationship is properly characterized as a contract.[97] The logical conclusion may be that student-athletes should be viewed more appropriately as employees, should be paid, should be eligible for worker's compensation benefits, and should be taxed on the value of their scholarships.[98]

However, in 1983 the Supreme Court of Indiana, in *Rensing v. Indiana State University Board of Trustees*,[99] held that an employer-employee relationship did not exist between Fred W. Rensing and the university.[100] This was a worker compensation case in which the Indiana Industrial Board found that the

---

95. *Id.*

96. *Id.* 558.

97. *See* Waters v. University of S.C., 280 S.C. 572, 313 S.E.2d 346 (Ct. App. 1984) (the court, applying a contractual analysis, did not allow a student athlete to recover $18,000 in damages, representing the difference between his room and board allowance and his actual expenses. Waters was injured, and the university gave him benefits for nine semesters, although it was only required to do so for eight semesters. The court said that the university fulfilled its part of the agreement); Barile v. University of Va., 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981) (the court of appeals reversed a lower court, which had dismissed a claim against the University of Virginia for lack of jurisdiction. The court said that it was persuaded that the University of Virginia, through its agent, a football coach, had met the requisite minimum contacts sufficient to subject it to jurisdiction in Ohio. The court then commented that college football was a business and the relationship between the student and institution was a business relationship and contractual in nature).

98. *See* WEISTART & LOWELL, *supra* note 4, § 1.06 at 11 (Professor Weistart says the conclusion that a financial aid award creates a contract is "troublesome," because the athlete may be in violation of the NCAA amateurism rules. I believe it is time we reconsider such outdated rules to make them more reflective of the realities of today's intercollegiate athletics environment.).

See generally Schinner, Michael, *Touchdowns and Taxes: Are Athletic Scholarships Merely Disguised Compensation?*, 8 AM. J. TAX POL'Y 127 (1989) (excellent discussion of the tax aspects of scholarships and public policy arguments against taxing scholarships).

99. 444 N.E.2d 1170 (Ind. 1983).

100. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1174 (Ind. 1983).

employer-employee relationship did not exist between the university and Rensing.[101] The Indiana Court of Appeals had reversed the Board and found that there was enough evidence that a contract existed and that Rensing was an employee for purposes of worker's compensation coverage.[102] In reversing the lower court, the Indiana Supreme Court said, "It is evident from the documents which formed the agreement in this case that there was no intent to enter into an employee-employer relationship at the time the parties entered into the agreement."[103] Moreover, the court said that the financial aid received by Rensing (tuition, room, board, laboratory fees and a book allowance) was not considered "pay" by Rensing, the university, or the NCAA.[104] The court reasoned that because Rensing's eligibility status was not affected, neither the university nor the NCAA considered the benefits to be "pay."[105]

Despite the language of the agreement, the intent of Rensing to play football in exchange for a scholarship, and the intent of the university to offer Rensing a scholarship in exchange for his skills as a football player, the Indiana Supreme Court said a contract did not exist.[106] In reaching its conclusion, the court relied on the NCAA rules, which prohibit taking pay for intercollegiate play, the fundamental educational policy behind the NCAA, and the fact that Rensing's scholarship was not viewed as income by the Internal Revenue Service.[107] The court concluded that Rensing was not " 'in the service of' " the university, that he did not receive " 'pay' " for playing football, and that neither party intended to

101. *Rensing*, 444 N.E.2d at 1171.

102. *Id.*

103. *Id.* at 1173.

104. *Id.*

105. *Id.* Rensing was given a scholarship to play football at Indiana State University in 1974, and he was injured in 1976. *Id.* at 1171-72. The injury left Rensing a quadriplegic. *Id.* at 1170. The language of the financial aid agreement provided that " 'in return for Rensing's active participation in football competition he would receive free tuition, room, board, laboratory fees, a book allowance, tutoring and a limited number of football tickets per game for family and friends.' " *Id.* at 1171. (quoting Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.E.2d 78 (Ind. Ct. App. 1982)). The value of the financial aid agreement was $2,374. *Id.*

106. *Id.* at 1174.

107. *Rensing*, 444 N.E.2d at 1173. Three cases from the United States Tax Court are instructive here. The cases involve income averaging, which is no longer available under the tax code. Tax Reform Act of 1986, Pub. L. No. 99-514 § 141A (1986). *See* Heidel v. Commissioner of Internal Revenue, 56 T.C. 95 (1971) (the court held that the value of a Southeastern Conference scholarship did not constitute support); Frost v. Commissioner of Internal Revenue, 61 T.C. 488 (1974) (the court held playing college baseball was not work); *But see* Jolitz v. Commissioner of Internal Revenue, 73 T.C. 732 (1980) (the court held college scholarships are included in computing support to determine whether a taxpayer is an eligible individual under section 1303).

establish an "employer-employee" relationship.[108]

The *Rensing* court did some fancy footwork in order to avoid characterizing the relationship between the student and institution as a contract.[109] However, closer scrutiny of the court's rationale reveals weaknesses.

First, the court made much ado regarding the fundamental educational policy behind the NCAA.[110] The court's conclusion begs the question. One of the major questions raised in this article is to what extent intercollegiate sport is truly compatible with higher education. The *Rensing* court stated that, because intercollegiate sports are connected to the educational system, they are clearly distinguished from professional sports. The pressures on coaches and student-athletes, in addition to the revenue at stake in Division I major sports, belies the court's distinction between intercollegiate and professional sports.

Second, the court made reference to the NCAA rules regarding pay.[111] How the NCAA has chosen to characterize the benefits bestowed upon Rensing is not determinative of the question of whether or not Rensing received pay within the meaning of the worker's compensation law. The NCAA, in its regulations, could decide to exclude from the definition of "pay" any money received by an active athlete from any source. Would the court then cite the NCAA regulations for guidance on what constitutes pay under the worker's compensation law? A scholarship is clearly something of value — indeed a monetary value of $2,374 per year, in *Rensing*.

Third, the court stated that because Rensing did not report the value of the scholarship as income, he therefore did not consider it as such.[112] Again, the court's reasoning takes a few leaps. Perhaps the first question to ask is whether Rensing filed an

---

108. *Rensing*, 444 N.E.2d at 1174. The court noted that at least three significant elements were missing from an employer-employee relationship: Rensing did not receive pay; there was a lack of intent to establish an employer-employee relationship; and the ordinary employer's right to discharge was missing, because the NCAA rules did not allow Rensing's scholarship to be reduced during the one-year term. *Id.*

The right to discharge argument is misplaced in this context, because if Rensing's performance during the year was inadequate, the university would simply not renew the scholarship, effectively discharging him from the team.

109. *See generally* Rafferty, *Rensing v. Indiana State University Board of Trustees: The Status of the College Scholarship Athlete—Employee or Student?*, 13 CAP. U.L. REV. 87 (1983) (excellent discussion of this case and the repercussions of its reasoning).

110. *Rensing*, 444 N.E.2d at 1173.

111. *Id.* The Court cites the NCAA regulations from a previous manual governing amateurism as NCAA Constitution, Section 3-1-(a)-(1) and Section 3-1-(g)-(2). *Id. See* NCAA BYLAW art. 12 NCAA MANUAL 1991-92, at 67 (article 12 governs amateurism currently).

112. *Rensing*, 444 N.E.2d at 1173.

income tax return at all. Even if he did, the fact that he did not include the value of his scholarship as income may not mean only that he did not intend it to be income. It could also mean that he was unaware of its value, that he did not know that it should be included as income, or that he simply forgot to include it, if he filed a tax return at all. Moreover, recent changes to the tax laws undercut the court's position that Rensing's scholarship is not income. The Tax Reform Act of 1986 provides that scholarship amounts provided to student-athletes for room and board are no longer excludable and, thus, are taxable income.[113]

In reaching its conclusion, the court stated that Rensing's benefits were not remuneration for services any more than an academic scholarship is given for high test scores.[114] The court suggested that both academic and athletic scholarships are offered on the basis of a student's past performance to allow them to pursue a college education.[115] But maintaining a specified grade-point average is frequently a precondition to receiving an academic scholarship. Similarly, possessing and maintaining certain athletic skill is a prerequisite to receiving and retaining an athletic scholarship.

Additionally, the court referred to the Indiana statute that governs employer contributions to unemployment insurance.[116] The court, engaging in its own creative statutory construction, stated that academic and athletic scholarship students are not covered by this statute, because it is meant to apply only to students who work for the university in capacities not integrally connected to the educational mission.[117] The court stated that the statute only applies to those students who replace "outsiders," like workers in the bookstore and laundry.[118] Such a construction is not apparent from the plain language of the law.

The court also made the point that "[a]n athlete receiving financial aid is still first and foremost a student,"[119] and that his

113. I.R.C. § 117(b) (1986). *See also* Philipps and Bullivant, *The Ill Effects of Mid-1980s Tax Policy on Higher Education*, 6 AKRON TAX J. 45, 52-55 (1989) (An excellent analysis of the effect of the Tax Reform Act of 1986 on scholarships).

114. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1174 (Ind. 1983).

115. *Id.*

116. *Id.* at 1173. *See* IND. CODE ANN. § 22-4-6-2 (Burns 1974) (the relevant portion provides that employers should include "all individuals attending an established school . . . who, in lieu of remuneration for such services, receive either meals, lodging, books, tuition or other education facilities.").

117. *Rensing*, 444 N.E.2d at 1173-74.

118. *Id.* at 1174.

119. *Id.* at 1173.

participation may benefit the university only in a general way.[120] Such a position reflects idealism rather than realism.[121] Many athletes are only in school to play their sport, and the benefits derived by institutions fielding quality teams amount to hundreds of thousands of dollars.[122]

Similarly, in a Michigan case decided five months after *Rensing*, the court in *Coleman v. Western Michigan University*,[123] applying the " 'economic reality' test for determining the existence of an [employment] relationship,"[124] held that even though the scholarship was a "payment of wages,"[125] an injured student-athlete was not an employee within the meaning of the Michigan Worker's Disability Compensation Act.[126]

Willie Coleman was offered an annual scholarship to play football for Western Michigan University.[127] Coleman did not work, but devoted his energies to football and his studies.[128] Coleman was injured during his third season, but his scholarship continued until the end of the year.[129] During the following fall, Coleman was forced to withdraw from the university because his scholarship had been reduced and he could not afford tuition.[130] Coleman applied for worker's compensation benefits, but was denied by the hearing referee, because he was not an employee.[131] Coleman appealed to the Michigan Workers' Compensation Appeal's Board (WCAB) and the WCAB affirmed the hearing referee's decision.[132] Coleman then appealed to the Court of Appeals of Michigan.[133]

The issue before the court was very simply whether Coleman was an employee within the meaning of the Michigan law.[134] The

---

120. *Id.* at 1174.

121. This court has seemingly bought into the myth of amateurism. Perhaps the courts fear that the complexities of an employee characterization for student-athletes would play havoc with intercollegiate sports. *See generally* Atkinson, *Workers' Compensation and College Athletics: Should Universities Be Responsible for Athletes Who Incur Serious Injuries?*, 10 J.C. & U.L. 197 (1983-84) (An excellent discussion of the worker's compensation implications of college scholarships).

122. Davis, *Academics and Athletics on a Collision Course*, 66 N.D.L. REV. 239, 254-56 (1990).

123. 125 Mich. App. 35, 336 N.W.2d 224 (1983).

124. Coleman v. Western Mich. Univ., 125 Mich. App. 35, 336 N.W.2d 224, 225 (1983).

125. *Id.* at __, 336 N.W.2d at 227.

126. *Id.* at __, 336 N.W.2d at 228.

127. *Id.* at __, 336 N.W.2d at 225.

128. *Id.*

129. *Coleman*, 125 Mich. App. at __, 336 N.W.2d at 225.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Coleman*, 125 Mich. App. at __, 336 N.W.2d at 225. The Michigan Worker's

court applied the " 'economic reality' test for determining the existence of an [employment] relationship."[135] In applying this test, the court considered four factors. First, the degree of control the university exercised over the student-athlete. Second, the university's ability to discipline or fire the student-athlete. Third, whether the student-athlete was paid wages. Fourth, whether the work of the student-athlete was " 'an integral part' " of the university business.[136]

The court considered the first two factors in tandem and concluded that the university's control over Coleman was limited, because scholarships were granted on a yearly basis and could not be revoked.[137] The court based its conclusion on record evidence indicating that even if Coleman was suspended from the team, his scholarship could not be revoked for that year.[138] Additionally, the court said that while the coaches may have had control over Coleman on the football field, they did not have control over him in the academic arena.[139] The court also relied on the university's position that Coleman was " 'a student first, athlete second.' "[140]

The court did not spend much time on the third factor of the economic reality test—the question of whether a scholarship was wages. The court concluded that a scholarship was wages and noted, "In return for his services as a football player, plaintiff received certain items of compensation which are measurable in money, including room and board, tuition and books."[141] Thus, the court stated that "The 'payment' of wages factor weighs in favor of the finding of an employment relationship."[142] The fourth factor did not seem particularly difficult for the court. The question was whether or not the football program was an integral part of the university business. The court focused on Coleman's testimony before the WCAB. Coleman said that " 'his purpose at the university was to further his education.' "[143] Playing football was a means of financing that education.[144] Thus, the WCAB con-

---

Disability Compensation Act defines employee as "[e]very person in the service of another, under any contract of hire, express or implied . . . ." MICH. COMP. LAWS ANN. § 418.161(1)(b) (West 1985 & Supp. 1990).

135. *Coleman*, 125 Mich. App. at __, 336 N.W.2d at 225.
136. *Id.*
137. *Id.* at __, 336 N.W.2d at 226.
138. *Id.*
139. *Id.*
140. *Coleman*, 125 Mich. App. at __, 336 N.W.2d at 226.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

cluded that Coleman did not consider himself an employee of the university.[145] Additionally, the court, again relying heavily on the WCAB findings, stated that playing football was not an integral part of the business of educating students.[146] The court stated:

> The mason, the janitor or the electrician who builds, cleans or maintains an employer's factory or office performs a function essential to the smooth and efficient operation of that employer's business. In this case, however, plaintiff's football playing was not essential to the business of the defendant university, which plaintiff himself recognizes 'as education and research.' The record supports the conclusion that defendant's academic program could operate effectively even in the absence of the intercollegiate football program.[147]

The court also noted that the " 'football season lasts for only a small portion of the academic year,' and contrasts this with the fact that 'the greater part of the school year is devoted exclusively to obtaining a regular college education.' "[148] Thus, the court balanced the factors of the economic reality test and concluded that the balance tipped in favor of the university's characterization of the student-athlete as a student-athlete and not an employee.[149]

The *Coleman* court, like the *Rensing* court, based its factual conclusions on a simplistic and idealistic perception of intercollegiate athletics, a perception that is far removed from the realities of intercollegiate athletics today. In discussing the control and discipline factors of the economic reality test, the court performed legal gymnastics and pushed the balance beam as far as it would go without breaking. The court suggested that the one year duration of scholarships places a limitation on the ability of the university to control the student athlete. Therefore, the court concluded that, because the university cannot revoke Coleman's scholarship at will, it does not have control or disciplinary authority over him.

The court's logic on this point is assailable. The control and discipline element of the economic reality test has not required an absolute right to fire. The control element has, as its focus, the ability of the employer to control the details of the work.[150] More-

145. *Coleman*, 125 Mich. App. at __, 336 N.W.2d at 227.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. 1C LARSON, THE LAW OF WORKMEN'S COMPENSATION § 44.10 (1986).

over, while the right to fire is a factor in the control equation, it may not be conclusive.[151] The court attempted to draw a comparison between the right to fire and terminating the athlete's scholarship. A more appropriate comparison would be the ability of the athletic department to prevent the student-athlete from playing his or her sport. In the area of athletics, the coach's degree of control is total and immediate. The coach decides who plays and who does not. While the coach may not be able to immediately revoke a scholarship, the scholarship can be reduced and ultimately not renewed. I would submit that the more appropriate control analogy is the ability of the coach to suspend the playing opportunities of the student-athlete.

Athletic departments support academic counseling programs, tutoring programs, class monitors and study halls. For the court to suggest that a scholarship does not subject a student to any control by the coaches over his academic activities is naive. The court has simply been arbitrary in its line-drawing. The court could have just as well attempted to argue that coaches have no control over whether or not the student-athlete graduates from college. That, too, would have ignored the realities of current-day intercollegiate athletics.

The court conceded that a scholarship falls within the definition of wages, but maintained that football is not an integral part of the university. The court continued to fall into an idealistic view of intercollegiate athletics as it concluded that football is not essential to the mission of the university.[152] The fundamental debate raging in intercollegiate athletics for the past sixty years has been the extent to which intercollegiate athletics is indeed central to the mission of the university. Noticeably absent from the court's analysis was any reference to the amount of revenue generated by football. The court did not discuss how the major sports help to fund minor sports, which provides an opportunity for many more students to become involved in athletics. The court failed to mention the relationship between healthy bodies and healthy minds. The court ignored the recruiting value of a strong athletics program. The court did not discuss the increase in alumni contributions when the teams are winning. In short, the court was myopic.

The court compared the limited duration of the football season with the academic year. Apparently, the court was not at all

151. *Id.* at § 44.35(e).

152. Coleman v. Western Mich. Univ., 125 Mich. App. 35, __, 336 N.W.2d 224, 227 (1983).

aware that when one discusses the work involved in athletics, the conference games are but a small part of the season. The season includes fall, spring and summer conditioning, daily film sessions, practices, and recruiting. Thus, taken as a whole, the economic reality test factors would weigh in favor of finding an employment relationship extant, if the court removed its nostalgic blinders and saw the games for what they are today.

Rensing and *Coleman*, in my view, are quite similar in approach and result. These cases help to derail an already not-so-consistent judicial approach to analyzing athletic scholarships.

Two recent California cases, *Graczyk v. Workers' Compensation Appeals Board*,[153] and *Townsend v. State of California*,[154] suggest that the best way to avoid the student-athlete/scholarship/employee quagmire is through legislative amendments to the definition of employee in worker's compensation laws. In both *Graczyk* and *Townsend*, the California Court of Appeal focused on the legislative amendments to the state's worker's compensation statute passed in response to *Van Horn v. Industrial Accident Commission*.[155] Recall that, in *Van Horn*, the court held that Edward Gary Van Horn, a football player who was killed in a plane crash returning from a game, was an employee within the meaning of the worker's compensation law. Thus, Van Horn's widow was entitled to collect worker's compensation benefits.

In an apparent response to the *Van Horn* case, the state legislature amended section 3352 in 1965. That section provided for exclusions from the term "employee" as anyone who participates in athletics but does not receive compensation and who incurs only incidental expenses like " 'transportation, travel, meals [and] lodging.' "[156] While this amendment was intended to clarify the meaning of employee in the statute, it still did not adequately address how a student-athlete receiving an athletic scholarship or grant-in-aid was to be treated. Thus, in 1981, the California legislature passed an additional clarifying amendment to section 3352, which included language specifically addressing the scholarship question. The new amendment provided:

> ' "Employee" excludes . . . [a]ny student participating

153. 184 Cal. App. 3d 997, 229 Cal. Rptr. 494 (1986).
154. 191 Cal. App. 3d 1530, 237 Cal. Rptr. 146 (1987).
155. 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963).
156. Graczyk v. Workers' Compensation Appeals Bd., 184 Cal. App. 3d 997, __, 229 Cal. Rptr. 494, 498-99 (1986).

> as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodging, *scholarships*, *grants-in-aid*, or other expenses incidental thereto.'[157]

Thus, this amendment and its legislative intent was the focus of the court's attention in *Graczyk*. Ricky D. Graczyk was a student-athlete at California State University, Fullerton (CSUF).[158] Graczyk sustained neck, head and spine injuries during the 1977-78 football season.[159] Though he was a highly recruited high school athlete, he did not receive an athletic scholarship for his freshman year.[160] However, as a sophomore, Graczyk did receive an athletic scholarship that was contingent upon a minimum academic performance.[161] Based on his injuries, Graczyk applied for worker's compensation benefits and was initially determined to be an employee by the State Worker's Compensation Board.[162] However, on reconsideration the Board determined that he was not an employee, based on the language in section 3352 excluding scholarship student-athletes.[163] This time the Board determined that the 1981 amendment could be applied retroactively.[164]

Graczyk appealed to the California Court of Appeal, alleging that he had "a 'vested right' in employee status" in 1977, when his injuries were sustained, and that the 1981 amendment could not be applied retroactively to disturb his rights as an employee at that time.[165] The court of appeal noted that worker's compensation benefits are " 'wholly statutory' " and not derived from common law.[166] The court also noted that because the law relating to athletes as employees had not been fixed until 1981, Graczyk did not have a vested right in an employee status.[167] Thus, the court reasoned that because the legislature expressly declared the retroactivity of the 1981 amendment, Graczyk was legislatively excluded

157. *Id.* at __, 229 Cal. Rptr. at 499-500 (emphasis added).
158. *Id.* at __, 229 Cal. Rptr. at 496.
159. *Id.*
160. *Id.*
161. *Graczyk*, 184 Cal. App. 3d at __, 229 Cal. Rptr. at 496.
162. *Id.* at __, 229 Cal. Rptr. at 497.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Graczyk*, 184 Cal. App. 3d at __, 229 Cal. Rptr. at 500.

from worker's compensation coverage.[168] The court noted that this result was "justified by police power [and] 'policy factors.' "[169] The court reasoned that the state interest of clarifying the employer-employee relationship in the context of student-athletes was sufficiently compelling to justify the retroactive application of the 1981 amendment.[170]

In *Townsend*, the court reached a similar conclusion in an action under the California Tort Claims Act for personal injury. In *Townsend*, Raymond Townsend, a basketball player for UCLA, was intentionally punched out by Ronald Lowe, a player for San Jose State during an intercollegiate game.[171] A jury awarded Townsend $25,000, but Townsend wanted more and sought recovery from not only Lowe, but the university, its coach and athletic director on a respondeat superior theory.[172] Townsend appealed, arguing that because of the revenue generated by intercollegiate sports, student-athletes are employees of the institutions they represent.[173]

The California Court of Appeal affirmed the superior court's determination that Lowe was not an employee of San Jose State.[174] The court focused on the California Tort Claims Act and the applicability of the doctrine of respondeat superior under the facts in Townsend.[175] The court concluded that a master/servant relationship did not exist. The court then cited the California Worker's Compensation Statute 3352, which excludes student-athletes from the definition of employee.[176] The court noted that universities were "not in the 'business' of playing football or basketball,"[177] but they provided an education to students. Thus, the court concluded whether or not a student-athlete was on scholarship, there was no employer-employee relationship.[178] The court recognized that "exposing . . . institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the state's precious educational resources."[179]

These cases are unique, because the California State Legisla-

168. *Id.* at __, 229 Cal. Rptr. at 501.
169. *Id.*
170. *Id.* at __, 229 Cal. Rptr. at 502.
171. Townsend v. State, 191 Cal. App. 3d 1530, 237 Cal. Rptr. 146 (1987).
172. *Id.*
173. *Id.*
174. *Id.* at __, 237 Cal. Rptr. at 150.
175. *Id.* at __, 237 Cal. Rptr. at 148.
176. *Townsend*, 191 Cal. App. 3d at __, 237 Cal. Rptr. at 149.
177. *Id.*
178. *Id.*
179. *Id.*

ture removed the scholarship student-athlete/employer-employee issue from the judiciary through legislative amendment. Such an exclusion has not been generally adopted in other states' worker's compensation laws.[180] Thus, for most jurisdictions, the debate still rages regarding the status of the scholarship student-athlete.[181]

A case recently decided in the United States District Court for the Northern District of Illinois, *Ross v. Creighton University*,[182] adds little clarity to defining the nature of the relationship between student-athlete and institution. *Ross* does not directly involve a determination of whether or not a student-athlete is an employee, but rather, whether or not Creighton University can be sued for "educational malpractice."[183] Kevin Ross was recruited and offered a scholarship to play basketball at Creighton University, even though the coaches knew he was terribly unprepared for work at the college level.[184] Ross played high school basketball in Kansas City, Kansas, and, at 6 feet 9 inches, he dominated the game.[185] His curriculum was laughable. Ross enrolled in "bonehead"[186] classes that would allow him to barely pass with minimal effort.[187] When his eligibility expired, Ross had a "D" grade point average, reading skills at the seventh-grade level and overall language skills at the fourth-grade level.[188] The coaching staff contracted with a preparatory elementary school in Chicago for Ross's remedial education.[189] Needless to say, it was difficult for a 6 foot

180. *See* 1C, LARSON, THE LAW OF WORKMEN'S COMPENSATION § 50.10 (1986). (Professor Larson discusses major and minor exemptions in the worker compensation laws and the student-athlete exemption is not listed in either category).

181. *See, e.g.*, MISS. CODE ANN.. § 71-3-3(d) (1989) (like other state statutes, distinguishes employees from independent contractors in its definition section, but it does not expressly exclude student-athletes. Thus, the courts in Mississippi and most other states continue to grapple with the scholarship student-athlete issue. Recently, the Mississippi Supreme Court reversed the State Worker Compensation Commission and held that a student nurse enrolled in a Junior College's Licensed Practical Nurse program was an employee of a hospital and entitled to worker compensation benefits for injuries sustained at the hospital. Walls v. North Miss. Medical Center, 568 So. 2d 712 (Miss. 1990). In *Walls*, the court said consent between the parties, consideration and control by the employer, the traditional elements of employment, existed. *Id.* at 715. The court also noted that anything of value can satisfy the consideration element. *Id.* at 717. Though there has not been a student-athlete claim for worker's compensation benefits, this decision may signal problems for scholarship student-athletes in Mississippi, should there be a claim filed in the future.

182. 740 F. Supp. 1319 (N.D. Ill. 1990).

183. Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D. Ill. 1990).

184. *Id.* at 1322. If Ross's high school grades provided no indication of his inability to do college work, his American College Test (ACT) score certainly screamed the message that this young athlete had severe problems. Ross scored 9 points out of a possible 36. The average student enrolled at Creighton scored 23. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

9 inch adult to feel comfortable among children. Ross was enrolled at Westside Preparatory School for the 1982-83 school year.[190] He also attended Roosevelt University, but withdrew because he could not afford tuition.[191] On July 23, 1987, out of sheer frustration with his circumstances, Ross locked himself in a hotel room in downtown Chicago and tossed furniture through the window onto the street below.[192] The destroyed furniture was valued at $7,500, and Ross was arrested and required to pay.[193] Ross then filed a complaint in federal district court, claiming damages against Creighton University for its failure to properly educate him.[194] Ross basically sued under a tort theory and a contract theory.[195] The court noted that Ross characterized his tort claim as a "hybrid of 'negligent infliction of emotional distress' and 'educational malpractice.' "[196] Under this theory, Ross alleged that the University should have provided him with better support services and should not have enrolled him in a preparatory school with "children half his age and size."[197] The court was not persuaded that it should recognize the tort of "educational malpractice" and held that it is almost impossible to show proximate cause in cases of that sort, because "[e]ducation is an intensely collaborative process" between the teacher and student.[198]

The purpose for discussing this case centers on what the court said regarding Ross's contract claims. Again, while this case did not involve defining the status of a scholarship student-athlete, the court stated, "As an abstract matter, the relationship between university and student is at least in part contractual."[199] But the court held that the same policies that forbid recognizing a tort for educational malpractice also prevent "a breach of contract claim based upon allegedly inferior instruction."[200] The court said Ross's claims were not that the University failed to provide any educational services, but that it failed to provide " 'adequate' " services.[201] Thus, in the court's view, Ross's lawsuit involved one of educational quality, something that it was incapable of

190. *Ross*, 740 F. Supp. at 1322.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Ross*, 740 F. Supp. at 1322-23.
196. *Id.* at 1327.
197. *Id.*
198. *Id.* at 1328.
199. *Id.* at 1330.
200. *Ross*, 740 F. Supp. at 1331.
201. *Id.* at 1331.

enforcing.[202]

Despite this conclusion, the court did say that a school would be responsible for meeting express terms of a contract.[203] Thus, had Ross included in his scholarship agreement with Creighton a requirement that specified hours of tutoring would be available in certain courses, those terms would be enforced.[204] Therefore, this court implies that it would have no problem viewing the scholarship agreement between the student-athlete and institution as an enforceable binding contract.[205]

Thus, the modern cases, like the early cases, also reflect a continuing struggle by the courts to properly characterize the relationship between the institution and the athlete. At first, the modern cases seemed to be headed in the direction of recognizing the contractual nature of the scholarship. The *Taylor* case did not suggest that the scholarship could be anything other than a contract.[206] Similarly, *Cardamone* focused on whether or not a contract existed.[207] In *Boyd*, the Alabama Supreme Court said the student-athlete/institution relationship was "contractual in nature."[208] But in 1983, *Rensing* and *Coleman* added a wrinkle. The Indiana Supreme Court strained logic and concluded that the football scholarship at issue was not a contract.[209] The Michigan Court of Appeals followed *Rensing*, applied an "economic reality test" in a very unrealistic fashion, and concluded that a scholarship student-athlete was not an employee.[210] The *Graczyk* and *Townsend* cases are anomalies because of legislative intervention, and *Ross* involves an educational malpractice claim that implies that where express agreements exist between the student-athlete and the institution, such agreements will be enforced.[211] However, *Ross* does not directly address the question of whether or not an athletic scholarship is a contract.

Thus, we are left with judicial inconsistency in the modern era. But *Rensing* and *Coleman* are the real wrinkles, because those decisions are the two best examples of the current struggle

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (1972).
207. Cardamone v. University of Pittsburgh, 235 Pa. Super. 65, 384 A.2d 1228 (1978).
208. Gulf South Conf. v. Boyd, 369 So. 2d 553 (Ala. 1979).
209. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983).
210. Coleman v. Western Mich. Univ., 125 Mich. App. 35, 336 N.W.2d 224 (1983).
211. Graczyk v. Workers' Compensation Appeals Bd., 184 Cal. App. 3d 997, 229 Cal. Rptr. 494 (1986); Townsend v. State, 191 Cal. App. 3d 1530, 237 Cal. Rptr. 146 (1987); Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).

between the academic and athletic missions of our institutions of higher learning. When we are able to resolve that conflict, we will greatly facilitate judicial consistency in this area.

IV. IMPLICATIONS FOR THE FUTURE

The concern of institutions is what recognizing the scholarship as a contract would mean. Would it suggest that the student-athlete is an employee? Would it suggest that the student-athlete is an independent contractor? What would recognizing the student-athlete as an employee mean? What would it mean for other scholarship students? To our Division I universities, these questions are foreboding because of the fear of the unknown.

But these questions need not raise undue concern, because recognizing student-athletes as contractual employees does not result in an unlimited parade of horribles. It simply means that universities will be required to secure its liability, on behalf of student-athletes in addition to its other employees, by making payments into the state worker's compensation fund, an insurance plan, or demonstrate the capacity for self-insurance.[212] This result supports a rational policy choice to make sure that the student-athletes who are injured are cared for beyond their athletic careers. Merely providing medical insurance coverage during an athlete's college career, or for a limited time subsequent, does not address the circumstances of a student-athlete who is injured and becomes a quadriplegic, or dies.[213] The recent NCAA program to allow star athletes to purchase disability insurance is good as far as it goes.[214] The problem is that the new plan only covers star play-

212. 4 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 92.10 (1989).

213. On October 28, 1989 a University of Mississippi football player was injured during a football game against Vanderbilt University. The University of Mississippi beat Vanderbilt 24 to 16, but the injuries left Rebels defensive back, Chucky Mullins, a quadriplegic. Clarion-Ledger, October 29, 1989 at 1c., col. 1. While the NCAA and Conference insurance policies covered Chucky's medical expenses, up to a 2 million dollar maximum within six years from the date of the accident, Chucky needed a place to live and people to care for him. Fortunately, the leadership within the university community established a Chucky Mullins Fund, and $230,000 was raised within one week of Chucky's accident. The Daily Mississippian, November 6, 1989 at 1, col. 1. Today the fund contains more than $830,000, and Chucky lives in a duplex in a subdivision in Oxford, Mississippi. The land on which Chucky's home was built was donated by the City of Oxford. Oxford Eagle, Wednesday March 21, 1990 at 1, col.3. The Chucky Mullins Story is a true testament to the people, black and white, of Mississippi and across the country who have donated to the Chucky Mullins Fund. But would the same thing happen to tomorrow's injured athlete? I take no comfort in depending on charity, and do not believe that our student athletes should be put in a position where they have no choice but to rely on it.

*Shortly before publication of this article, Chucky Mullins died in Memphis, Tennessee of complications from a blood clot in his lungs. SPORTS ILLUSTRATED, May 13, 1991, at 100; Clarion-Ledger, May 7, 1991 at 1, col. 1.

214. Some Athletes can get Disability Insurance, NCAA News, October 22, 1990, at 1,

ers, and all of our athletes compete and face risk of injury and could lose future earnings. All athletes should be protected, not just those likely to be drafted in the first or second round of professional league drafts.

Moreover, the law does not support a conclusion that student-athletes are independent contractors.[215] The primary difference between an employee and an independent contractor rests in the extent to which the employer exercises control over the details of the work to be performed.[216] The primary factors in determining control include: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire."[217] On all counts, the student-athlete is controlled by the university and its coaches. The student-athlete is told when to report for training and practice, when to take a day off, and when to eat, sleep, and study.[218] While the student-athlete is paid only the value of an athletic scholarship, he or she is paid, nevertheless. The institution furnishes all of the facilities and equipment necessary for practice and competition. If the student-athlete does not adhere to the terms and conditions of the scholarship, coaches rules, NCAA regulations, and conference and institutional rules, the athlete may lose his or her position with the team, scholarship and eligibility. Thus, it does not require any strained logic to conclude that student-athletes are heavily controlled by the institution and should be treated as employees.

When discussing this issue, many people raise the question, well what about all other scholarship students? What about them? They could be included as employees also. I suspect the injury rate for football players as compared to piano players is much higher. Thus, the cost to secure insurance for different classes of employees would be different. Moreover, revenues received from

---

col. 1. I do not believe that we fans who enjoy quality athletic performances would mind paying a higher ticket price for the cost of insuring all student-athletes against catastrophic injury. Perhaps disability insurance would be even a better way of approaching the student-athlete employee relationship rather than solely relying on the relatively small payments the worker's compensation system would provide to an injured student-athlete.

215. Townsend v. State, 191 Cal. App. 3d 1530, __, 237 Cal. Rptr. 146, 148 (1987).

216. 1C LARSON, THE LAW OF WORKMEN'S COMPENSATION § 44.00 (1986).

217. *Id.*

218. If there were any doubts about the extent of the control over student-athletes, one need only consult the NCAA MANUAL, article 17, which governs playing and practice seasons. Moreover, during the 1991 "Reform Convention" in Nashville, Tennessee, the delegates passed legislation that more closely resembles wages, hours and working conditions. See, for example, Proposal No. 38-E, Time Limits for Athletically Related Activities. This new measure establishes "daily and weekly hour limitations on athletically related activities." Convention Voting Summary, NCAA News, January 16, 1991, at 11, col. 3.

television appearances or bowl games could certainly help to defray the cost of injury security.[219] Additionally, as *Graczyk* and *Townsend* illustrate, certain employees can be excluded from coverage, should the state legislatures choose to do so. There is ample reason to treat major sport student-athletes differently from other minor-sport student-athletes, based on the revenue earned for the university. Thus, in my view, the oft-ballyhooed parade of horribles resulting from according student-athletes employee status is really no parade at all. The student-athletes, in fact, would be better off.

V. CONCLUSION

It is, of course, the responsibility of the university to acknowledge the true nature of the relationship between itself and the student-athlete. The universities should openly acknowledge the contractual nature of the relationship and conduct their business accordingly, or they should de-emphasize college sports. However, few Division I schools are willing to make that difficult decision—it is easier for some schools to continue the hypocrisy. Instead, many institutions have continued to endorse the myth of amateurism by maintaining professional athletic programs. Murray Sperber says it best in his new book, College Sports Inc., where he concludes:

> Thus athletes on grants are contractual employees of an athletic program. They sell their talents as sports entertainers in exchange for athletic scholarships. They cannot be compared to regular students because the latter are consumers, not sellers. Athletes are like staff members whom the university hires on the basis of their skills to do particular jobs.[220]

These decisions regarding athletes and scholarships are further evidence of the tension between academics and athletics. The judicial trend seems to be toward a reluctant recognition that the scholarship is a simple contract to employ the athlete-student to perform athletic services. But the courts are not speaking with one voice on that issue, as the *Rensing* and *Coleman* decisions illustrate. The reason universities are reluctant to accept the real

219. *See generally* Atkinson, *supra* note 122 (The ideas mentioned are a variation of Atkinson's ideas raised in his article).

220. Murray Sperber, *College Sports Inc., The Athletic Department Versus The University*, 208 (1990).

nature of this arrangement is because it would require a radical shift in our approach to amateur athletics. No longer would the institution be able to conceal the business relationship behind the facade of the academic mission. For once, the universities would have to openly admit that the athletic departments are in the business of entertaining students, alumni, and faculty, as well as the communities in which those universities are located. This admission brings with it additional costs of providing benefits and increased compensation packages to the university's illegitimate athletic employee. But certainly, it is better to absorb additional financial costs for injury security rather than continue to incur the human expense of lost opportunities, inadequate education, and meaningless college degrees.